Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

VINOD KUMAR DAHIYA,
Petitioner,

VERSUS

TALMIDGE INTERNATIONAL, LTD., NEPTUNE SHIPMANAGEMENT SERVICES (PTE) LTD., AMERICAN EAGLE TANKERS, INC., LTD., AMERICAN EAGLE TANKERS AGENCIES, INC. AND THE BRITANNIA STEAMSHIP INSURANCE ASSOCIATION, LTD.,
Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After trial and judgment on the merits, the Louisiana state courts ordered that a seaman's personal injury suit should be stayed in favor of arbitration, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 USC 201, et seq.) ("the Convention"). Two aspects of the ruling on this important federal question are in conflict with decisions of the Circuit Courts.

1) May the mandatory provision of the Convention (at Article IV) requiring the supply of the original arbitration agreement, or a duly certified copy, be disregarded, or must it be complied with, as held by each of the federal appellate courts to have considered the issue?

2) May a signatory to an agreement containing an arbitration clause be required to arbitrate claims against a non-party to the agreement, based upon the non-party's status as a purported agent of a signatory?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption of this matter contains the name of all parties to the proceeding.

In compliance with Rule 29.6 of the Rules of the Supreme Court, there are no non-party parent corporations or publicly-traded companies that are required to be identified.

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CITATIONS OF OPINIONS BELOW

The opinion of the Louisiana Fourth Circuit Court of Appeals is reported at 931 So.2d 1163, 2006 AMC 1463 (La. App. 4th Cir. 5/26/06), No. 2005-0514, rehearing denied (6/30/06).

The denial of certiorari by the Louisiana Supreme Court is reported at 943 So.2d 1088 (La. 12/8/06), No. 2006-1913.

Previous decisions in the case have been reported at:

2002 WL 31962151, 2002 AMC 2429 (E.D. La. 2002) (remand order and denial of arbitration);

371 F.3d 207, 2004 AMC 1334 (5th Cir. 2004), rehearing en banc denied 380 F.3d 218 (5th Cir. 2004) (dismissal of appeal);

Cert. denied, 543 U.S. 1052, 125 S.Ct. 889, 160 L.Ed.2d 774, 2005 AMC 2998 (2005);

865 So.2d 724 (La. 2/6/04) 2003-3180 (denial of cert. on unreported denial of supervisory writ affirming denial of arbitration).

NO. 07-

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VINOD KUMAR DAHIYA,
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VERSUS

TALMIDGE INTERNATIONAL, LTD., NEPTUNE SHIPMANAGEMENT SERVICES (PTE) LTD., AMERICAN EAGLE TANKERS, INC., LTD. AMERICAN EAGLE TANKERS AGENCIES, INC. AND THE BRITANNIA STEAMSHIP INSURANCE ASSOCIATION, LTD.,
Respondents.

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC 1257. The case involves the validity of a treaty of the United States and privileges and immunities claimed thereunder, as well as the validity of a Louisiana statute asserted to be repugnant to a treaty of the United

States. The Supreme Court of the State of Louisiana denied petitioner's petition for certiorari on December 8, 2006.

RELEVANT PROVISIONS

The full text of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is reprinted following 9 USC 201, and set forth in the Appendix at pp. 27a-37a. At issue herein is Article IV, which pertinently provides:

> 1. To obtain the recognition and enforcement mentioned in the preceding Article, the party applying for recognition and enforcement shall, at the time of the application, supply:
>
> > a. The duly authenticated original award or a duly certified copy thereof;
> >
> > b. The original agreement referred to in Article II, or a duly certified copy of thereof.

The full text of Louisiana R.S. 23:921 is set forth in the Appendix at pp. 38a-42a. Subsection (A)(2) pertinently provides:

> (2) The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or a choice of law clause in an employee's contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or a choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.

STATEMENT OF THE CASE: FACTS

Seaman Vinod Kumar Dahiya sustained serious burn injuries[1] when operating the incinerator of his vessel on November 13, 1999. The accident came only two months after Dahiya turned 18 and signed a document entitled "Deed" in his native India. The Deed required

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[1] Dahiya sustained burns over 39% of his body, and was thereafter assessed with a 27% permanent partial impairment.

Dahiya to work in the employ of respondent Neptune Shipmanagement Services (PTE) Ltd. for two years, to follow a two year training period. A provision in the Deed required for the arbitration of any disputes arising out of the agreement by Neptune's preselected arbitrator.

Dahiya was promptly dispatched to Corpus Christi, Texas, where he signed on to the M/T EAGLE AUSTIN as an engine room cadet (trainee). The EAGLE AUSTIN was an oil tanker serving ports in Texas, Louisiana and Venezuela, owned by respondent Talmidge International, Ltd. It was part of a fleet of oil tankers plying the Gulf of Mexico operated by respondents American Eagle Tankers, Inc., Ltd. and American Eagle Tankers Agencies, Inc. Dahiya's injury occurred as the vessel was transporting Venezuelan crude oil to a Louisiana refinery.

The Deed was signed only by Dahiya. Other than Neptune, none of the other respondent-defendants were party to or even mentioned in the Deed.

STATEMENT OF THE CASE: PROCEDURAL

After the accident, Dahiya moved to Louisiana. He filed suit against the respondents to recover personal injury damages under the Jones Act and general maritime law in Louisiana state court, pursuant to the Saving to Suitors clause, 28 USC 1333(1). Before trial, respondents removed the case to U.S. District Court pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and 9 USC 205.

In the federal court, respondents moved to dismiss and/or stay the litigation in favor of arbitration.

Dahiya opposed the stay and moved to remand the action to state court. Dahiya raised multiple defenses to arbitration, including: (1) that the Convention's requirement of supplying the original arbitration agreement or a duly certified copy had not been satisfied; (2) that several of the defendants-respondents were neither parties nor signatory to the purported arbitration agreement, and had no right to require Dahiya to arbitrate his claims against them; and (3) that a Louisiana statute (La. R.S. 23:921) invalidating forum selection clauses in employment contracts evidenced a strong public policy of the forum state rendering recognition of the arbitration agreement inappropriate under Article V(2)(b) of the Convention.[2]

Based on the Louisiana statute, the U.S. District Court denied arbitration and granted Dahiya's motion to remand, without reaching Dahiya's other defenses to arbitration. Dahiya's action was thereafter litigated concurrently in the state and federal courts. In the state courts, the defendants-respondents presented the identical arbitration issues, and Dahiya raised the identical

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[2] The defenses were among eleven defenses first presented in the U.S. District Court in Dahiya's Motion to Remand filed August 9, 2002 and in Dahiya's opposition to respondents' motion to compel arbitration, etc., filed September 17, 2002.

objections. Again, arbitration was denied in the state district court based upon the Louisiana anti-forum selection statute, without reaching Dahiya's other defenses. The Louisiana Fourth Circuit Court of Appeal denied the defendants-respondents' application for supervisory writs, and the Louisiana Supreme Court denied certiorari.

Meanwhile, defendants-respondents appealed the remand and the denial of their requested arbitration relief to the U.S. Fifth Circuit Court of Appeals. That Court initially dismissed the action as barred by res judicata based upon the intervening decisions in the Louisiana state courts, but then withdrew that dismissal and instead dismissed the action for lack of appellate jurisdiction. Defendants-respondents' application to this Court for certiorari was denied.[3]

The case proceeded to trial on the merits in the Louisiana state court. Dahiya was awarded a total judgment of $579,988.00, assessed half-each against the employer (Neptune) and shipowner (Talmidge) defendants. Defendants again appealed and re-urged their arbitration defenses. Dahiya's briefing specifically

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[3] Petitioner is not unaware of the irony presented by this circumstance: Having successfully opposed respondents' efforts to have the federal courts decide the federal questions raised by their assertion of the Convention, petitioner is now asking the federal courts to correct the faulty resolution of those federal questions obtained in the state court.

re-urged his still-unadjudicated alternative defenses to arbitration.[4] The Louisiana Court of Appeals reversed, now holding that the Louisiana statute was preempted by the Convention. Apparently focused on the interplay of the Louisiana statute and the Convention, the state court never ruled on or even addressed Dahiya's other defenses to arbitration. Dahiya's application for rehearing was denied, and the Louisiana Supreme Court denied certiorari (two Justices voting to grant). No respondent has ever sought to initiate an arbitration.

This application for certiorari timely followed.

WHAT IS SOUGHT

ARGUMENT AND REASONS FOR GRANTING THE PETITION

The disposition of Dahiya's case in the Louisiana state court was in direct conflict with decisions of several U.S. Courts of Appeal and the explicit language of the Convention. Although it is undisputed that respondents-

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[4] In the Louisiana Fourth Circuit Court of Appeal: Original Brief filed June 14, 2005 at pp. 7-8; Reply Brief filed July 11, 2005, at p. 6; Application for Rehearing filed June 9, 2006, at pp. 1-9.

In the Louisiana Supreme Court: Application for Certiorari filed July 31, 2006, at pp. 9-17; Response to Opposition to Certiorari filed August 21, 2006, at pp. 3-5.

defendants did not supply the original agreement (Deed) or a duly certified copy at the time of their application, as expressly required by the Convention, the Louisiana courts overlooked this fatal deficiency and failed to even comment upon Dahiya's repeated objections to the omission. In direct conflict, each federal circuit court of appeal to address this issue has noted that compliance is essential for the party seeking recognition or enforcement of an arbitration agreement or award.

The Louisiana state courts have also impliedly decided an important question of federal law that has not been, but should be, decided by this Court: Whether a signatory to an arbitration agreement can be required to arbitrate his claim against an entity not party to the agreement, based upon that entity's purported status as an agent of a signatory party. A conflict exists among the federal circuit courts of appeal on this issue.

Question 1: The complete disregard of the Convention's requirement to supply the original or a certified copy of the arbitration agreement is an implicit rebuke of the Convention and of the federal circuit courts of appeal which have upheld its requirements.

The language of the Convention is simple and straightforward. Article IV, Section 1 (b) specifies that a party applying for recognition of a foreign arbitral agreement shall, at the time of the application, supply the original written agreement containing the arbitration provision, or a duly certified copy thereof. In Dahiya's case, it is undisputed that respondents supplied neither

the original nor a certified copy, but instead a marginally-legible purported photocopy.

This particular provision of the Convention has never been addressed by this Court, and only occasionally by the circuit courts. On those occasions when it has been addressed, the circuit courts have uniformly referenced the Convention's requirement as an essential prerequisite.

In Bergesen v. Joseph Muller Corporation, 710 F.2d 928 (2nd Cir. 1983), a vessel owner arbitrated a dispute arising out of a charter party. The Court traced the historical context of the Convention from its inception in 1958 and considered the intent of the legislation implementing the U.S. accession in 1970. Among the grounds presented by the charterer in seeking to avoid the enforcement of the arbitral award was a contention that Article IV of the Convention required that the duly certified copy of the arbitration agreement be made from the "duly authenticated original." The Court held that the shipowner's supply of copies of the award and the agreement certified by a member of the arbitration panel was sufficient to meet the requirements of the Convention, and enforced the award.

In China Minmetals Materials Import & Export Company, Ltd. v. Chi Mei Corporation, 334 F.3d 274 (3rd Cir. 2003), a party resisted enforcement of an arbitration award, contending that the alleged arbitration agreement was a forgery. At issue was a transaction in which a payment was allegedly fraudulently obtained through the

presentation of false documents. The panel majority held that the party opposing enforcement had not waived its right to a judicial determination of whether the Convention's Article II requirement of an agreement-in-writing had been satisfied, and remanded for that purpose. In concurrence, then-Circuit Judge Alito elaborated on the importance of Article IV, Section 1(b) of the Convention in the context, because arbitration is a matter of contract and a party can be forced to arbitrate only those issues it specifically agrees to submit to arbitration. 334 F.3d at 292:

> These principles find expression in Article IV, Section 1(b), which provides that a party seeking to enforce an arbitral agreement must, "at the time of the application, supply . . . [t]he original agreement referred to in Article II or a duly certified copy thereof." . . .
>
> Article IV, Section 1(b), as noted, requires a party seeking enforcement to supply the Court with "[t]he original agreement referred to in Article II," and it is apparent that this means that the party seeking enforcement must provide the Court with either a duly signed written contract containing an arbitration clause or an agreement to arbitrate that is evidenced by an exchange of letters or telegrams.

Most recently, in Czarina, LLC v. W.F. Poe Syndicate, 358 F.2d 1286 (11th Cir. 2004), enforcement of a foreign arbitration award arising out of a reinsurance arrangement was sought pursuant to the Convention. The Court discussed both the Article II agreement-in-writing requirement and the original document/certified copy requirements of Article IV, holding that each was a jurisdictional prerequisite for the Court.

Czarina expressly noted the mandatory nature of the Article IV requirements:

> The failure of a party to satisfy Article IV's requirements qualifies as one of the "grounds for refusal or deferral . . . specified in the said Convention," id., because the Convention uses mandatory language in establishing the prerequisites: "[t]o obtain the recognition and enforcement mentioned in the preceding Article, the party applying for recognition and enforcement *shall, at the time of the application, supply*" a copy of the award and the arbitration agreement, Convention, supra, Article IV, Section 1, 9 USC §201 (historical and statutory notes) (emphasis added). This mandatory language also indicates that without these requirements being satisfied, the Court is without power to confirm an award. Thus, we hold that the party seeking confirmation of an award falling under

> the Convention must meet Article IV's prerequisites to establish the district court's subject matter jurisdiction to confirm the award. Fn.3.
>
> 358 F.3d at 1292 (Fn. 3 omitted).

While another Circuit Court of Appeal[5] has questioned Czarina's treatment of the Article II and IV requirements as being jurisdictional issues, as opposed to merits issues, no federal circuit court of appeal has disregarded those requirements altogether, as occurred to Dahiya in the Louisiana state courts.

Question 2: The Circuit Courts of Appeal are deeply divided over whether status as an agent of a signatory to an arbitration agreement entitles a non-signatory to require another signatory to arbitrate a dispute against the non-signatory. This issue is of substantial importance to Dahiya in that the judgment he obtained against non-signatory respondent-vessel owner Talmidge has been stayed in favor of an arbitration agreement to which Talmidge is a complete stranger. This issue is of considerable importance on a larger, commercial scale in that it repetitively comes up in cases arising under both the Convention and the Federal Arbitration Act (9 USC 1, et seq.), but receives disparate and uncertain treatment.

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[5] Sarhank Group v. Oracle Corp., 404 F.3d 657 (2nd Cir. 2005).

The Fifth Circuit discussed the conflict among the circuits in Westmoreland v. Sadoux, 299 F.3d 462 (5th Cir. 2002). There, a minority shareholder claimed that he was cheated out of the full value of the shares he sold to corporate fellow shareholders by the fraud of individuals who owned and controlled the corporate entities. The shareholder agreement regarding the securities contained an arbitration provision. The individual defendants were not parties to the shareholder agreement.

The Court noted that a non-signatory is permitted to invoke an arbitration agreement only in rare circumstances, identifying only two: (1) when the signatory-claimant must rely on the terms of the written agreement containing the arbitration clause in asserting its claims against the non-signatory; and (2) when the signatory-claimant raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract containing the arbitration clause. 299 F.3d at 467. Westmoreland expressly rejected the non-signatory's contention that status as an agent of a signatory was sufficient to entitle the non-signatory to compel the signatory claimant to arbitrate. Westmoreland cited and relied upon cases from the First and Ninth Circuits (infra) on this point, rejecting the reasoning of a Third Circuit case.

In McCarthy v. Azure, 22 F.3d 351 (1st Cir. 1994), the Court rejected a claim that status as a disclosed agent of a signatory entitled the agent to enforce the arbitration provision included in his

principal's agreement with plaintiff. McCarthy held that an overt indication that the parties intended to commit claims against a purported agent "as an individual" to an arbitral forum was required in order to permit the non-signatory agent of a signatory to invoke an arbitration clause. The Court noted that even an implied reference to the agent likely would not suffice as a predicate to allow the non-signatory to enforce arbitration against the signatory. 22 F.3d at 358. Fn. 9.

In Britton v. Co-Op Banking Group, 4 F.3d 742 (9th Cir. 1993), the Court held that a non-signatory agent, officer and employee of a signatory could not compel arbitration of the adverse signatory's claim. The Court's analysis made clear that the non-signatory's entitlement to require a signatory to arbitrate could flow only from status in one of three categories: as a third party beneficiary to the contract containing the arbitration provision; as assignee or as successor in interest to the contract; or, as being within a class of agents intended as beneficiaries of the arbitration clause.

A contrary conclusion was reached in Pritzker v. Merrill Lynch Pierce Fenner & Smith, 7 F.3d 1110 (3rd Cir. 1993). There, trustees of a pension plan sued a securities brokerage firm, its financial consultant and its subsidiary corporation for alleged ERISA violations. The Court enforced the arbitration provision the claimant had executed with the brokerage firm, and also permitted the non-signatory individual financial consultant and the non-signatory subsidiary financial advisor firm to compel arbitration. The Court reasoned that the employee and financial advisor were

both acting as agents of the signatory brokerage firm, and therefore were covered under the terms of the agreement (including the arbitration clause) to which the brokerage firm was bound. 7 F.3d at 1121, 1122.

Other circuits have adopted positions consistent with the Third Circuit's ruling in Pritzker. The Fourth Circuit has broadly stated that a non-signatory may invoke an arbitration clause under ordinary state-law principles of agency or contract. Long v. Silver, 248 F.3d 309, 320 (4th Cir. 2001).

The Seventh Circuit has suggested in dicta that agency status would be sufficient to allow a non-signatory to compel a signatory to arbitrate. Continental Casualty Company v. American National Insurance Company, 417 F.3d 727 (7th Cir. 2005), at fn. 9.

The existing state of the law in other circuit courts of appeal is uncertain on this point.

The Eighth Circuit has yet to decide whether, or under what circumstances, non-signatories to a contractual agreement can enforce an arbitration clause. CD-Partners, LLC v. Grizzle, 424 F.3d 795 (8th Cir. 2005) (Smith, Circuit Judge, dissenting, 424 F.3d at 802). There, a corporate franchisee sued the principals of a corporate franchisor, alleging negligent misrepresentation and fraud. The Court permitted the non-signatory principals to require the franchisee to arbitrate, based on estoppel theories, distinguishing the First Circuit's reasoning in McCarthy, supra.

The Eleventh Circuit has declined to specifically determine whether a non-signatory can require a signatory to arbitrate under either an agency theory or a third party beneficiary theory. MS Dealer Service Corp. v. Franklin, 177 F.3d 942, 948 (11th Cir. 1999). The MS Dealer opinion extensively cited to a district court case which held that "under agency or related principles" a non-signatory could compel a signatory to arbitrate. However, the court instead decided the case on equitable estoppel grounds.

CONCLUSION

The Court should grant certiorari in this case because of the important federal and international implications of the underlying issues arising under the Convention. The Louisiana courts' disregard of the requisites of the Convention directly conflicts with the treaty and with decisions of the United States courts of appeal.

The Court should also grant certiorari in order to resolve the existing conflict amongst the circuit courts as to whether status as the purported agent of a signatory entitles a non-signatory to an arbitration agreement to require a signatory to arbitrate the signatory's claims against the non-signatory. This is an important question of federal law which repeatedly arises in cases coming under both the Convention and the FAA that has not been, but should be, settled by this Court.

Respectfully submitted:

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Appendix A

The Supreme Court of the State of Louisiana

VINOD KUMAR DAHIYA

VS. NO. 2006-C-1913

TALMIDGE INTERNATIONAL, LTD., ET AL.

- - - - -

IN RE: Dahiya, Vinod Kumar; - Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of Plaquemines, Plaquemines Div. B, Nos. 48-357; to the Court of Appeal, Fourth Circuit, No. 2005-CA-0514.

- - - - -

December 8, 2006
Denied.

PFC
BJJ
JPV
CDT
JLW

KIMBALL, J., would grant.
KNOLL, J., would grant.

Supreme Court of Louisiana
December 8, 2006

Deputy Clerk of Court
For the Court

Appendix A

Court of Appeal of Louisiana,
Fourth Circuit.
Vinod Kumar DAHIYA
v.
TALMIDGE INTERNATIONAL LTD., Neptune Shipmanagement Services (PTE), Ltd., American Eagle Tankers, Inc., Ltd., American Eagle Tankers Agencies, Inc. and The Britannia Steam Ship Insurance Association Ltd.
No. 2005-CA-0514.
May 26, 2006.
Rehearing Denied June 30, 2006.

Kevin C. O'Bryon, Sherri L. Hutton, O'Bryon & Schnabel, PLC, New Orleans, LA, for Plaintiff/Appellant.

Gary A. Hemphill, Terriberry, Carroll & Yancey, L.L.P., New Orleans, LA, for Defendant/Appellant.

(Court composed of Judge CHARLES R. JONES, Judge DENNIS R. BAGNERIS SR., and Judge EDWIN A. LOMBARD).

Appendix A

CHARLES R. JONES, Judge.

This matter results from the district court's judgment in favor of the plaintiff, Vinod Dahiya, in the total amount of $579,988.00, and against the defendants, Talmidge International, Ltd., Neptune Shipmanagement Services (PTE.), Ltd, and American Eagle Tankers Agencies, Inc. Prior to rendering judgment in this matter, the district court denied the defendants' Exceptions of No Right of Action, and Improper Venue, finding that a Louisiana statute that nullifies forum selection clauses in contracts of employment preempts federal law, specifically, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "the Convention"), an international treaty of the United States. Having reviewed the record before this Court, the judgment in favor of the plaintiff, Vinod Dahiya, is reversed, and this matter is *remanded* to the district court.

FACTS

This is a maritime personal injury case in which the district court awarded damages for extensive burn injuries suffered by a seaman, Mr. Dahiya, in the service of his vessel. Mr. Dahiya is a citizen of India. In 1999, he applied for a job with Singapore-based Neptune Shipmanagement Services (Pte., Ltd.) (hereinafter "Neptune"), was hired, and signed a contract of employment or "deed" that specified the terms and conditions of his employment. Neptune then paid for Mr.

Appendix A

Dahiya to be sent to a maritime training school and eventually employed him on the M/V EAGLE AUSTIN, a Singaporean flag vessel, as an engine room cadet.

The incident which gave rise to this litigation occurred on the vessel in November 1999, while Mr. Dahiya was operating an incinerator in the engine room. The cause of the incident was contested at trial, but the district court found that the cause of Mr. Dahiya's burn injuries was Neptune's negligence and the Eagle Austin's unseaworthiness. Judgment was entered against Neptune and against Talmidge International, Ltd., the vessel owner.[FN1] These liability findings are not contested on appeal.

> FN1. Judgment was rendered in favor of Mr. Dahiya in the total amount of $579,988.00. Mr. Dahiya has filed a cross-appeal alleging that this amount is inadequate. Mr. Dahiya's cross-appeal also alleges that the district court inadvertently omitted to include the defendants' insurer, The Britannia Steam Ship Insur. Assoc., Ltd., as a party cast in judgment.

The accident occurred while the vessel was on the high seas in international waters. Because the vessel was en route to Louisiana at the time, Mr. Dahiya was transported to the burn unit at the Baton Rouge General

Medical Center where he received medical care for approximately 30 days before being repatriated to his home in India. His employer paid all medical and travel expenses, so at trial there was no claim for past medical expenses.

Mr. Dahiya returned to Louisiana in 2001, when he came here on a student visa. He subsequently filed suit in 2002. While this suit was pending, Mr. Dahiya's status with the United States Immigration and Naturalization Service became tenuous because of his failure to maintain his status as a student. Whether Mr. Dahiya has been permitted to return to the United States as of this time is not of record.

PROCEDURAL HISTORY

Although the legal issue before this Court is relatively narrow, the procedural history of this case is fairly convoluted. Mr. Dahiya filed suit in the 25th Judicial District Court for the Parish of Plaquemines in March, 2002, against his employer, Neptune Shipmanagement Services; the owner of the ship on which he was injured, Talmidge International; co-owners of the fleet to which the ship belongs, American Eagle Tankers and American Eagle Tankers Agencies; and the ship's insurer, Brittania Steam Ship Insurance Association. Pursuant to the Convention and the holding of the United States Fifth Circuit Court of Appeals in *Francisco v. Stolt Achievement*, 293 F.3d 270 (5th Cir.) *cert. den.* 537 U.S.

1030, 123 S.Ct. 561, 154 L.Ed.2d 445 (2002), the defendants removed the case to the United States District Court for the Eastern District of Louisiana on July 15, 2002. Once in federal court, the defendants moved to compel arbitration and to stay the proceedings or, in the alternative, to dismiss Mr. Dahiya's suit. Mr. Dahiya moved to remand, arguing that the contract's terms did not qualify as an arbitration agreement under the Convention and therefore could not support removal under 9 U.S.C.A. § 205 [FN2] which provides in pertinent part that:

> FN2. Because the defendants failed to remove within thirty days, federal jurisdiction hinged entirely on § 205.

[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

Although finding that the arbitration clause in Mr. Dahiya's contract was applicable and virtually identical to the one enforced by the Fifth Circuit in Francisco, Judge Martin L.C. Feldman of the Eastern District remanded the case to state court on October 21, 2002, on

the ground that Louisiana Revised Statute 23:921 precluded enforcement of the arbitration clause. With respect to § 205, the court reasoned that because the deed contained no valid forum selection clause, the parties had not entered into an agreement to arbitrate valid under the Convention.

From that point, parallel proceedings, one in federal court and one in state court, went forward. Defendants filed a federal appeal of Judge Feldman's ruling. While that appeal was pending, Judge Feldman revisited the issue of the alleged preclusive affect of R.S. 23:921 in *Lejano v. K.S. BANDAK*, C.A. 00-2990, 2000 WL 33416866 (E.D.La.2000). In that decision, Judge Feldman recanted his prior remand order in this case with the following comment:

The plaintiffs' again argue that the Court's ruling in *Vinod Kumar Dahiya v. Talmidge International, Ltd., et al*, Civil Action No. 02-2135 (October 11, 2002), should apply to this case. The Court disagrees. Although the Court lacks jurisdiction to vacate its earlier ruling granting remand in *Dahiya*, after further review of the Supreme Court's ruling in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) and its reasoning in *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), the Court finds that its ruling in *Dahiya* was incorrect.

Appendix A

Because Judge Feldman no longer had jurisdiction at that point, however, he could not rectify his error and the federal appeal continued. Because of a general federal rule precluding appeals of remand orders, however, a split panel of the Fifth Circuit dismissed the appeal for lack of appellate jurisdiction, noting that federal statutory law "... bars a federal appellate court from reviewing the remand ruling 'no matter how erroneous.' " *Dahiya v. Talmidge International, Ltd., et al,* 371 F.3d 207, 209 (5th Cir.2004), citing *Arnold v. State Farm Fire & Cas. Co.,* 277 F.3d 772, 775 (5th Cir.2001); and 28 U.S.C.A. § 1447(d), (d) (West 1994).

DISCUSSION

In their first assignment of error, the Appellants assert that the district court erred as a matter of law when it failed to sustain the Appellants' Exceptions of No Right of Action, Improper Venue and Arbitration pursuant to an arbitration forum selection clause in Mr. Dahiya's contract of employment, or to dismiss or stay the case pending arbitration. We agree and find that federal law supercedes any state law that purports to nullify forum selection clauses in employment contracts and vitiate an international treaty obligation of the United States.

Standard of Review

We review the district court's failure to enforce the arbitration clause in Mr. Dahiya's employment contract *de novo* because it was based implicitly on the court's

legal conclusion that Louisiana statutory law supercedes the Convention. The Louisiana Supreme Court stated in *Cleco Evangeline, LLC v. Louisiana Tax Commission,* 01-2162 (La.4/3/02), 813 So.2d 351, 353, with respect to an issue of law being reviewed on appeal that "[w]e review the matter *de novo,* and render judgment on the record, without deference to the legal conclusions of the tribunals below." The issue regarding whether federal law preempts state law is a question of law, so this issue must be reviewed *de novo* by this Court. *In Re Medical Review Panel Proceedings for the Claim of Allan Tinoco, et al. v. Meadowcrest Hospital, et al.,* 03-0272 (La.App. 4 Cir. 9/17/03), 858 So.2d 99, 103, citing *Crawford v. Blue Cross and Blue Shield of La.,* 00-2026, p. 3 (La.App. 4 Cir. 12/5/01), 814 So.2d 574, 577.

Analysis

The defendants contend that federal law, specifically the Convention, preempts state statutory law and thus, the arbitration clause in Mr. Dahiya's contract of employment is valid and should have been enforced. The Convention was negotiated in 1958 and entered into by the United States in 1970 pursuant to the Constitution's treaty power. That same year, Congress adopted enabling legislation, codified at 9 U.S.C. § 201 et seq., to make the Convention, "the highest law of the land." As such, the Convention must be enforced according to its terms over all prior inconsistent rules of law. *F.A. Richard and Associates, Inc. v. General Marine Catering Co., Inc.,*

688 So.2d 199, 202 (La.App. 4 Cir. 1/29/97), citing *Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co.*, 767 F.2d 1140 (5th Cir.1985). The Supremacy Clause declares that federal law "shall be the supreme law of the land[,] ... any Thing [sic] in the Constitution or *Laws of any State* to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2 (emphasis added). See, *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 904 (5th Cir.2005). The Fifth Circuit has found that "Where [state] laws conflict with a treaty, they must bow to the *superior federal policy.*" *Id. citing Zschernig v. Miller*, 389 U.S. 429, 441, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968) (emphasis added).

Congress' implementing legislation for the Convention is found as part of the Arbitration Act. 9 U.S.C. § 1 et seq. Chapter 1 of Title 9 is the Federal Arbitration Act (hereinafter "FAA") passed long ago to overcome American courts' common law hostility to the arbitration of disputes. *Id.* The Convention incorporates the terms of the FAA, codified at 9 U.S.C. § 1 et seq., which in turn specifically requires that a court stay litigation of a dispute that is subject to arbitration.

However, Louisiana law is completely inapposite. Louisiana Revised Statute 23:921(A)(2) states:

The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or other person or entity includes a

choice of forum clause or choice of law clause in an employee's contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.

Louisiana Revised Statute 23:921(A)(2).

The Louisiana anti-forum-selection-clause statute conflicts directly with the Convention's mandate to enforce arbitration clauses.

Furthermore, while the United States Constitution grants jurisdiction to federal district courts in all "Cases of admiralty and maritime jurisdiction," U.S. Const. art. III, § 2, see also 28 U.S.C. § 1333(1), state courts have concurrent jurisdiction by virtue of the "saving to suitors" clause of the Judiciary Act of 1789 as amended.

In the present case, Mr. Dahiya, although his case falls within federal admiralty jurisdiction, brought his case in state court pursuant to the savings to suitors clause, designating his suit as a suit in admiralty or a general maritime claim in his original Petition for Damages: "This case is an admiralty and/or maritime claim brought in state court under the saving to suitors clause

and is brought pursuant to Article 1732(6) of the Louisiana Code of Civil Procedure."

"As a general proposition, '[a] maritime claim brought in common law state courts ... is governed by the same principles as govern actions brought in admiralty, i.e., by federal maritime law.' " *Giorgio v. Alliance Operating Corp., et al,* 05-0002, pg. 10 (La.1/19/06), 921 So.2d 58, 67, citing *Green v. Industrial Helicopters, Inc.,* 593 So.2d 634, 637 (La.1992), *cert. denied,* 506 U.S. 819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992). "Thus, with admiralty jurisdiction comes the application of substantive admiralty law." *Giorgio,* at 921 So.2d 67, citing *New England Mut. Marine Ins. Co. v. Dunham,* 78 U.S. (11 Wall.) 1, 25, 20 L.Ed. 90 (1870).

However, the general maritime law is not a complete or all-inclusive system.

When new situations arise that are not directly governed by legislation or admiralty precedent, federal courts may fashion a rule for decision by a variety of methods. Federal courts may, and often do, look to state statutory law and to precepts of the common law which they "borrow" and apply as federal admiralty rule. Moreover, federal courts may apply state law, as such, to a case with the admiralty jurisdiction if the occurrence is "maritime but local" and there is no need to fashion a uniform admiralty rule. Finally, federal courts may apply state law and regulations to supplement the general maritime law

when there is no conflict between the two systems of law, and the need for uniformity of decision does not bar state action. *Giorgio* 921 So.2d at 67-68, citing T. Schoenbaum, Admiralty and Maritime Law § 4-1, pp. 158-59.

"It is well settled that by virtue of the savings clause 'a state, "having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents as it sees fit" so long as it does not attempt to make changes in the substantive maritime law.' " *Giorgio,* 921 So.2d at 67-68, citing *Green,* 593 So.2d at 637. The Court in *Giorgio* noted that:

The United States Supreme Court has made clear that the uniformity principle does not preclude the application of state law in admiralty; rather, the decision whether to apply state law in cases within admiralty jurisdiction must be based upon balancing state and federal interests:

[T]he fact that maritime law is-in a special sense at least ...-federal law and therefore supreme by virtue of Article VI of the Constitution carries with it the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing or significant. But the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent

interests in a transaction as to which both have some concern.

Giorgio, at pg. 11, 921 So.2d 58, citing *Kossick v. United Fruit Co.,* 365 U.S. 731, 739, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961).

"Therefore, state law may be applied where the state's interest in a matter is greater than the federal interest." *Giorgio,* 921 So.2d at 68, citing *Green,* 593 So.2d at 638. However, we find that in the instant case, the interest in federal policy outweighs that of state policy; therefore, federal law preempts state law.

Repeatedly, Congress has endorsed arbitration clauses, first through the passage of the Federal Arbitration Act (hereinafter "FAA"), and then through adoption of the Convention and implementation of the Convention Act. *Lim,* 404 F.3d at 905. "In 1984, the United States Supreme Court held the Federal Arbitration Act preempts state law and concluded that state courts cannot apply state statutes that invalidate arbitration agreements." *F.A. Richard and Associates, Inc. v. General Maritime Catering Co., Inc.,* 96-1902 (La.App. 4 Cir. 1/29/97), 688 So.2d 199, 202, citing *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). "The Court reaffirmed its decision regarding the Federal Arbitration Act's preemption of state law in *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) and *Allied-Bruce Terminix*

Companies, Inc. v. Dobson, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). Thus, the Convention, which encompasses Chapter 2 of Title 9, The FAA, preempts any state law that would invalidate arbitration agreements." *F.A. Richard and Associates, Inc. v. General Marine Catering Co., Inc.*, 688 So.2d at 202. The district court's finding otherwise is erroneous.

Moreover, federal courts have supported this strong policy in favor of arbitration. "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Lim*, 404 F.3d at 906, quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). In the context of the Convention, the Supreme Court held: "[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' [arbitration] agreement, *even assuming that a contrary result would be forthcoming in a domestic context.*" *Lim*, 404 F.3d at 906, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (emphasis added). "More specifically, federal courts have endorsed federal arbitration policy by applying the Convention to seaman's employment contracts." *Lim*, citing *Francisco*, 293 F.3d at 274; *Bautista v. Star Cruises*, 396 F.3d 1289, 1300 (11th Cir.2005).

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We note that in weighing these competing policy concerns, plaintiff's employment contract does not present the inequities the Louisiana statute was crafted to prevent. See Lim. "That statute seeks to protect Louisiana citizen-employees from being subjected to litigation in a foreign forum, under laws with which they are not familiar and before a foreign body." *Lim*, citing Testimony of Representative Jackson, Official Minutes of Louisiana Senate Committee on Labor and Industrial Relations, Hearing on Senate Bill 915 (22 April 1999). Plaintiff in this case is a resident and citizen of India. His employment contract does not require him to bring claims in a foreign forum, but instead require him to submit to arbitration in his home country, before Mr. Dahiya's countrymen.

Nevertheless, the United States Supreme Court in *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), held that a contractual choice-of-forum clause should be held unenforceable if its enforcement would contravene a strong public policy of the forum in which suit was brought, whether declared by statute or by judicial decision. *Id.*, 407 U.S. at 15-16, 92 S.Ct. at 1916.

While we acknowledge that the Louisiana Supreme Court did find in *Sawicki v. K/S Stavanger Prince*, 802 So.2d 598, 603 (La.2001) that La. R.S. 23:921 A(2) is an expression of strong Louisiana public policy concerning forum selection clauses, we note that the Court very

recently stated in *Giorgio* that "federal courts may apply state law and regulations to supplement the general maritime law when there is **no conflict between the two systems of law, and the need for uniformity of decision does not bar state action.**" *Giorgio,* 921 So.2d at 67, quoting Schoenbaum, *supra,* at § 4-1, pp. 158-59. The Court further noted that "it is well settled that by virtue of the savings clause 'a state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents as it sees fit' so long as it does not attempt to make changes in the substantive maritime law." *Giorgio* 921 So.2d at 67-68, citing *Green v. Industrial Helicopters, Inc.,* 593 So.2d 634, 637 (La.1992), *cert. denied,* 506 U.S. 819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992).

Thus, there would appear to be two competing policy interests here. By enacting § 23:921, the Louisiana legislature has expressed its concern that in order for forum selection and choice of law clauses in employment contracts to be valid, employees must ratify them subsequent to the incidents giving rise to the claims. La. R.S. § 23:921A(2) (West 2004). The Louisiana Supreme Court, in *Sawicki,* 802 So.2d at 603, stated that the statutory requirement that employees agree to the forum (arbitration versus court, or choice of court) and the law to be applied after the fact of their inquiry or dispute occurs reflects Louisiana's strong public policy concerning forum selection clauses.

However, the federal policy indicated by the Supreme Court in *Bremen* pulls in the opposite direction entirely. In *Bremen,* the ship at issue "was to traverse the waters of many jurisdictions ... [That] the accident occurred in the Gulf of Mexico and the barge was towed to Tampa in an emergency were mere fortuities." 407 U.S. at 13, 92 S.Ct. at 1915. The Court explained that the international contracting parties wanted to provide a neutral forum beforehand, so that there would be no question as to what would happen in case of a dispute. *Id.* This strong federal policy regarding the validity of pre-dispute selections of forum arises from "sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co. (Pemex),* 767 F.2d 1140, 1148-49 (5th Cir.1985). This Court also recognizes the strong federal policy in favor of rigorously enforcing the specific forum choice of arbitration and arbitration awards, as reflected by Congress in enacting the FAA and the Convention. See *Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 858, 79 L.Ed.2d 1 (1984); *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519-20, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

Predictability in the resolution of disputes is what the Appellants desired and what Mr. Dahiya expressly agreed to in his deed here, and precisely what § 23:921 conflicts with. If an accident or incident were to occur during and relating to Mr. Dahiya's training and employment under Neptune, notwithstanding in which body of water,

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Section II.8 of Mr. Dahiya's deed clearly anticipated the procedure to be followed-arbitration in either India or Singapore before a specific arbitrator who would apply Indian arbitration law. That this incident occurred in international waters near Louisiana and that Mr. Dahiya received emergency medical treatment in Louisiana are "mere fortuities" because Mr. Dahiya and Neptune had already agreed to submit to arbitration elsewhere.

Section 23:921 voids all arbitration clauses in employment contracts, regardless of their terms. We find that this policy not only directly conflicts with *Bremen's* presumption of validity for forum selection clauses in general, but it also conflicts with the proarbitration policy set out by Congress in the FAA and the Convention that similarly presumes arbitration provisions to be "valid, irrevocable, and enforceable." 9 U.S.C.A. § 2. The presumption of validity of arbitration clauses is also what another public policy of Louisiana heavily favors, as evidenced by our legislature's enactment of La. R.S. § 9:4201, which closely mirrors § 2 of the FAA. *See Id;* La. R.S. § 9:4201. Thus, Louisiana's general policy on arbitration is consistent with federal policy that arbitration clauses should be considered presumptively valid.

Given the weight of these competing policy concerns, we find that Mr. Dahiya has not met his heavy burden of showing that the forum selection clause in his deed is unreasonable, and we thus find that the district court

erred in concluding that Mr. Dahiya had made such a showing.

Additionally, we find that any argument that the arbitration clause in Mr. Dahiya's deed is foreclosed by La. R.S. § 23:921 must be tried and tested by preemption analysis. Federal statutes enacted pursuant to the United States Constitution are the supreme law of the land, "[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 108, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (citations omitted). Section 2 of the FAA, enacted by Congress pursuant to the Commerce Clause and incorporated by the Convention in 9 U.S.C. § 208, "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp v. Mercury Const. Corp,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

Finally, the Convention contemplates a limited inquiry by courts when considering whether to compel arbitration. The inquiry questions (1) is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow; (2) does the agreement provide for arbitration in the territory of a Convention signatory; (3) does the agreement to arbitrate arise out of a commercial legal relationship; and

(4) is a party to the agreement not an American citizen. If these requirements are met, the Convention requires the courts to order arbitration. Sedco, Inc., 767 F.2d at 1144-45; *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 185-186 (1 Cir.1982).

We find that Mr. Dahiya's arbitration clause easily meets all four requirements of the Convention and that the district court erred in not staying the proceedings and compelling arbitration per the Appellants' motions. In the instant case, Mr. Dahiya signed a deed covering his twelve months of practical training at-sea, which would be applied to his three-year Diploma in Maritime Studies. He also agreed in the deed to serve as an employee of Neptune or a company of Neptune's choosing for a bonded period of two years after receiving his degree and passing his Class V exam. Section I.17 outlined how much Neptune would pay Mr. Dahiya as "wages" for the two years remaining before receiving his degree-the first consisting of his at-sea training and the second year consisting of his attendance of classes at the National Maritime Academy in Singapore. We find that because both parties exchanged promises in the deed, it served as an employment contract.

Both Singapore and India are signatories to the Convention.[FN3] Thus, the second requirement for the Convention to apply is met in the case *sub judice*. The third requirement for the Convention to apply is that the agreement arises out of a commercial legal relationship.

Francisco, 293 F.3d at 273. The U.S. Fifth Circuit Court of Appeals held in *Francisco*, that seaman employment contracts are commercial legal relationships covered by the Convention, even though they are excepted by the FAA. *Id.* at 274-75. Accordingly, we find that the third requirement is also met.

> FN3. In 1960, India acceded to the Convention; in 1986, Singapore acceded to the Convention.

Lastly, the final requirement for the Convention to apply is that there must be a party to the agreement who is not an American citizen. *Id.* at 273. It is clear that neither Mr. Dahiya, nor Neptune is an American citizen. Thus, we find that the final requirement is also met in this case.

Mr. Dahiya's contract of employment with Neptune contains an arbitration forum selection clause requiring all disputes to be resolved in arbitration in either Singapore or India, pursuant to Indian law. The arbitration clause brings the case within the scope of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an international treaty of the United States and, as such, the supreme law of the land. Federal law controls and makes clear that the Convention preempts state law, in this case a Louisiana statute that nullifies forum selection clauses in contracts of employment. We find that pursuant to The Convention and the Federal Arbitration Act, the defendants'

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Exceptions of No Right of Action, Improper Venue and Arbitration should have been sustained and the case stayed pending arbitration. Accordingly, we find that the Appellants' first assignment of error has merit and we therefore reverse the district court's ruling.

In their second assignment of error, the Appellants argue that the district court's award of general damages was improperly based on economic standards and legal precedent of the United States as opposed to that of India, Mr. Dahiya's native country.

In their third assignment of error, the Appellants contend that the district court's award for past lost wages and future medical expenses was not supported by the evidence. Because we find that the district court improperly applied Louisiana statutory law, rather than federal law, we pretermit any discussion of the appellants' second and third assignments of error that address general and special damages, as well as the cross-appeal of Mr. Dahiya, as they are now moot. Mr. Dahiya files a cross-appeal arguing that the district court inadvertently omitted the defendants' insurer, Britannia, and that the general damage award is inadequate. As stated previously, we pretermit any discussion of these issues for the reasons discussed supra.

Furthermore, we find Mr. Dahiya's argument that the law of the case doctrine bars any review of whether federal law preempts state law in this matter [FN4], to be

inapplicable because the Louisiana Supreme Court has very recently ruled on this issue in *Giorgio v. Alliance Operating Corp., et al.* Thus, we must follow the law as set forth in *Giorgio*.

> FN4. The defendants previously filed an application for supervisory writs regarding the enforceability of the arbitration clause. This Court denied the application finding that La. R.S. 23:921 invalidates the arbitration clause. This application was denied prior to the Louisiana Supreme Court's ruling in *Giorgio*.

DECREE

For the foregoing reasons, we reverse the district court's judgment. The matter is remanded to the district court for further proceedings consistent with the reasons cited herein.

REVERSED AND REMANDED.

Appendix A

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

410 Royal Street

New Orleans, LA 70130-2199

Clerk's Office, New Orleans, this June 30, 2006

To Whom It May Concern:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED.

VINOD KUMAR DAHIYA

VERSUS

TALMIDGE INTERNATIONAL LTD., NEPTUNE SHIPMANAGEMENT SERVICES (PTE), LTD., AMERICAN EAGLE TANKERS, INC., LTD., AMERICAN EAGLE TANKERS AGENCIES, INC. AND THE BRITANIA STEAM SHIP INSURANCE ASSOCIATION LTD.

CASE NO. 2005-CA-0514

Sincerely,

DANIELLE A. SCHOTT

CLERK OF COURT

Appendix A

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are

considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect to which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

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There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is

invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral

awards entered into by the Contracting States nor deprive any interest party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [27 LNTS 157; 92 LNTS 301] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice [T.S. 993; 59 Stat. 1055], or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

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1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional

reasons, to the consent of the Governments of such territories.

Article XI

In the cāse of a federal or non-unitary State the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to the extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Appendix A

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or

enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

Appendix A

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Convention on the Recognition and Enforement of Foreign Arbitral Awards. Done at New York June 10, 1958; entered into force for the United States December 29, 1970, subject to declarations.

Implementing Legislation Pub.L. 91-368, 84 Stat. 692, 9 USC 201-208

States which are parties:

India [FN12]

Singapore [FN22b]

United States [FN29]

(additional states omitted)

Appendix A

§ 921. Restraint of business prohibited; restraint on forum prohibited; competing business; contracts against engaging in; provisions for

A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void.

(2) The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.

B. Any person, including a corporation and the individual shareholders of such corporation, who sells the goodwill of a business may agree with the buyer that the seller will refrain from carrying on or engaging in a business similar to the business being sold or from soliciting customers of the business being sold within a specified parish or parishes, or municipality or municipalities, or parts

thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, not to exceed a period of two years from the date of sale.

C. Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment. An independent contractor, whose work is performed pursuant to a written contract, may enter into an agreement to refrain from carrying on or engaging in a business similar to the business of the person with whom the independent contractor has contracted, on the same basis as if the independent contractor were an employee, for a period not to exceed two years from the date of the last work performed under the written contract.

D. Upon or in anticipation of a dissolution of the partnership, the partnership and the individual partners, including a corporation and the individual shareholders if the corporation is a partner, may agree that none of the partners will carry on a similar business within the same parish or parishes, or municipality or municipalities, or

within specified parts thereof, where the partnership business has been transacted, not to exceed a period of two years from the date of dissolution.

E. (1) Parties to a franchise may agree that:

(a) The franchisor shall refrain from selling, distributing, or granting additional franchises to sell or distribute, within defined geographic territory, those products or services which are the subject of the franchise.

(b) The franchisee shall:

(i) During the term of the franchise, refrain from competing with the franchisor or other franchisees of the franchisor or engaging in any other business similar to that which is the subject of the franchise.

(ii) For a period not to exceed two years following severance of the franchise relationship, refrain from engaging in any other business similar to that which is the subject of the franchise and from competing with or soliciting the customers of the franchisor or other franchisees of the franchisor.

(2) As used in this Subsection:

(a) "Franchise" means any continuing commercial relationship created by any arrangement or arrangements as defined in 16 Code of Federal Regulations 436.2(a)

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(b) "Franchisee" means any person who participates in a franchise relationship as a franchisee, partner, shareholder with at least a ten percent interest in the franchisee, executive officer of the franchisee, or a person to whom an interest in a franchise is sold, as defined in 16 Code of Federal Regulations 436.2(d), provided that no person shall be included in this definition unless he has signed an agreement expressly binding him to the provisions thereof.

(c) "Franchisor" means any person who participates in a franchise relationship as a franchisor as defined in 16 Code of Federal Regulations 436.2(c).

F. (1) An employee may at any time enter into an agreement with his employer that, for a period not to exceed two years from the date of the termination of employment, he will refrain from engaging in any work or activity to design, write, modify, or implement any computer program that directly competes with any confidential computer program owned, licensed, or marketed by the employer, and to which the employee had direct access during the term of his employment or services.

(2) As used in this Subsection, "confidential" means that which:

(a) Is not generally known to and not readily ascertainable by other persons.

(b) Is the subject of reasonable efforts under the circumstances to maintain its secrecy.

(3) As used in this Subsection, "computer program" means a plan, routine, or set of statements or instructions, including any subset, subroutine, or portion of instructions, regardless of format or medium, which are capable, when incorporated into a machine-readable medium, of causing a computer to perform a particular task or function or achieve a particular result.

(4) As used in this Subsection, "employee" shall mean any individual, corporation, partnership, or any other entity which contracts or agrees with an employer to perform, provide, or furnish any services to, for, or on behalf of such employer.

G. Any agreement covered by Subsections B, C, D, E, or F of this Section shall be considered an obligation not to do, and failure to perform may entitle the obligee to recover damages for the loss sustained and the profit of which he has been deprived. In addition, upon proof of the obligor's failure to perform, and without the necessity of proving irreparable injury, a court of competent jurisdiction shall order injunctive relief enforcing the terms of the agreement.